No. 20386

IN THE UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

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CHARLES CORNET and	)
	)
REX STIDHAM WINDOM, JR.,	)
	)
Appellants,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellee.	)
	)
	)

APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF NEVADA

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APPELLANTS' OPENING BRIEF

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APPELLANTS' OPENING BRIEF

ISDICTIONAL STATEMENT:

Defendants were prosecuted in the United tes District Court for the District of Nevada from a Criminal ormation charging mail fraud in violation of Title 18, Section ., United States Code. (T.R. Vol 1, page 19-21)

The case was tried to a jury which returned dicts finding the defendants guilty as charged. (T. R. Vol 1, 55-56) The defendants were adjudged guilty and sentenced to risonment. (T. R. Vol 1, pp. 64-65)

The defendants appealed to this Court from the dict of the jury and the judgment and sentence of the United

States District Court for the District of Nevada. (T. R. Vol. 1, p. 66)

STATEMENT OF THE CASE:

On March 20, 1964, a criminal complaint was filed with the United States Commissioner for the District of Nevada charging the defendants with violation of the United States Code, Title 18, Section 1341, for mail fraud, on March 12, 1964, and warrants were on the same day issued for the arrest of the defendants. (T. R. Vol 1, p. 6) The criminal complaint appears at pages 7-10 of the Transcript of Record, Volume One.

On March 20, 1964, the defendant Windom was arrested and brought before the United States Commissioner at Phoenix, Arizona, where Defendant Windom waived hearing and was admitted to bail bond for which was posted in Arizona on March 23, 1964, and forwarded to Nevada. (T. R. Vol 1, p. 11)

The defendant Cornet was arrested in the State of Nevada and bail was fixed on March 20, 1964. (T. R. Vol 1, p. 6) Bond for Defendant Cornet was executed on March 27, 1964. (T. R. Vol 1, p. 18)

Criminal Information No. 958 charging the defendants for mail fraud in violation of Title 18, Section 1341, United States Code, was filed in the United States District

Court for the District of Nevada on May 1, 1964, (T. R. Vol 1, pp. 19-21) on which date the defendants pleaded Not Guilty. (T. R. Vol 1, p. 2, docketed for 5/1/64)

On February 23, 1965, the defendants moved the dismissal of the Information on the ground the Court had no jurisdiction of the offense since the Information showed on its face that the mailing of the offensive matter was after the fruition and completion of the alleged fraudulent scheme. (T. R. Vol 1, p. 22) Following argument to the court on the motion on March 26, 1965, the lower court denied defendants' motion to dismiss. (T. R. Vol 1, p. 3), Docket Entry for 3/26/65) A two-day jury trial was commenced on July 1, 1965, and the jury returned verdicts finding each of the defendants guilty as charged. (T. R. Vol 1, pp. 55-56)

The defendants thereafter filed their motion to dismiss, motion for judgment of acquittal and motion for new trial (T. R. Vol 1, p. 57) which was argued to and denied by the lower court on August 16, 1965. (Vol 4, T. R.) On August 16, 1965, the defendants were adjudged guilty and each was sentenced to imprisonment for a period of five (5) years and to pay a fine of $1,000.00. (T. R. Vol. 1, pp. 64-65)

Appeal was taken from the verdict of the jury, the judgment and sentence of the lower court to the United States Court of Appeals for the Ninth Circuit on August 16, 1965.

GENERAL STATEMENT OF FACTS:

The defendants were charged with using the mails to defraud in violation of Title 18, Section 1341, United States Code, for fraudulent and unauthorized use of a Phillips Petroleum Company Credit Card issued to Allied Oklahoma Corporation for the purpose of obtaining from Phillips Petroleum Company, Inc. and the Allied Oklahoma Corporation, three automobile tires of the value of $150.00 and service to the automobile of the value of $22.55, at a Phillips 66 Gasoline Service Station in Las Vegas, Nevada.

It was charged that as a part of the scheme and artifice to defraud that "on or about March 18, 1964, the aforesaid invoices also known as delivery tickets also known as credit slips would be and were forwarded in the ordinary course of business by mail from Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri." (T. R. Vol. 1, p. 21, Paragraph 7)

It was further charged that "On or about March 18, 1964, at Las Vegas, Clark County, State and District

of Nevada, defendants Cornet and Windom, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused to be placed in an authorized depository for mail matter, in the District of Nevada, a letter to be sent and delivered by the Post Office Department according to the directions thereon, from Saveway Super Stations, Inc., Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri. (T. R. Vol. 1, p. 21, Paragraph 8)

As already noted under the Statement of the Case, the defendants moved for the dismissal of the criminal information asserting the court was without jurisdiction of the alleged offense since the information showed on its face that the alleged fraud was completed before any use of the mails occurred. The Court denied this motion and jury trial was had, where issues were raised and litigated concerning the following questions on this appeal:

QUESTIONS RAISED BY THIS APPEAL:

I.

Should the lower court have dismissed the Criminal Information on the ground it showed on its face that the fraudulent scheme was completed before any use of the mails

ccurred, thus rendering the lower court without any jurisdiction ver the alleged offense?

2.

Was there any substantial evidence to identify he defendants as the perpetrators of the crime charged?

3.

Was there any substantial evidence that the efendants knowingly caused any mail matter to be delivered y the Post Office Department for the purpose of executing or ttempting to execute a scheme to defraud?

4.

Did the lower court prejudice the rights of he defendants by instructing the jurors as follows:

"You will note that the information charges that as a part of the scheme and artifice to defraud that a letter was caused to be mailed from Las Vegas, Nevada, to Phillips Petroleum Company, Kansas City, Missouri, on or about the 18th day of March, 1964. The proof in this case, as I recall it, and what it actually is, of course, is up to you, was that it wasn't a letter that was mailed, but it was a box. I instruct you that this is immaterial as long as matter that can be mailed was mailed, and that the

mailing did not happen on the 18th of March, as charged, but sometime after the 23rd, between the 23rd and the 26th, and again this is my recollection of the evidence, and the final determination is up to you. I instruct you that if you so find that there are these variances, these differences between the information and the proof, that these are immaterial variances, they are of no consequence and should not cause you any difficulty during your deliberations." (T. R., Vol. 3, p. 219)

5.

Did the lower court prejudice the rights of the defendants by refusing to instruct the jury in accordance with Defendants' Proposed Instruction No. 8 presented to the lower court after the close of argument to the jury by the Government wherein the Government Prosecutor made certain misstatements of the evidence in the case:

"You are instructed that you may have the testimony of any witness read to you upon your request, if there is conflict in your minds as to what any witness may have testified to during the trial."

The consideration of each of these questions

requires a detailed analysis of portions and aspects of the record which are essentially different and distinct; therefore, the facts will be set forth separately under the Points of this Brief dealing with the foregoing questions.

SPECIFICATIONS OF ERRORS:

1. The lower court erred in denying the defendants' motion to dismiss the criminal information, made before the commencement of the trial.

2. The lower court erred in denying the defendants' motion for judgment of acquittal made at the conclusion of the Government's case-in-chief.

3. The lower court erred in instructing the jury as follows:

> "You will note that the information charges that as a part of the scheme and artifice to defraud that a letter was caused to be mailed from Las Vegas, Nevada, to Phillips Petroleum Company, Kansas City, Missouri, on or about the 18th day of March, 1964. The proof in this case, as I recall it, and what it actually is, of course, is up to you, was that it wasn't a letter that was mailed, but it was a box. I instruct you that this is immaterial as long as matter than can be mailed

was mailed, and that the mailing did not happen on the 15th of March, as charged, but sometime after the 23rd, between the 23rd and the 26th, and again this is my recollection of the evidence, and the final determination is up to you. I instruct you that if you so find that there are these variances, these differences between the information and the proof, that these are immaterial variances, they are of no consequence and should not cause you any difficulty during your deliberation." (T. R., Vol. 3, p. 219)

4. The lower court erred in refusing to instruct the jury according to Defendants' Proposed Instruction No. 8 as follows:

"You are instructed that you may have the testimony of any witness read to you upon your request, if there is conflict in your minds as to what any witness may have testified to during the trial."

5. The lower court erred in denying the motion of the defendants to dismiss the information, for judgment of acquittal and for a new trial.

was mailed, and that the mailing did not happen on the 18th of March, as charged, but sometime after the 23rd, between the 23rd and the 26th, and again this is my recollection of the evidence, and the final determination is up to you. I instruct you that if you so find that there are these variances, these differences between the information and the proof, that these are immaterial variances, they are of no consequence and should not cause you any difficulty during your deliberation." (T. R., Vol. 3, p. 219)

4. The lower court erred in refusing to instruct the jury according to Defendants' Proposed Instruction No. 8 as follows:

"You are instructed that you may have the testimony of any witness read to you upon your request, if there is conflict in your minds as to what any witness may have testified to during the trial."

5. The lower court erred in denying the motion of the defendants to dismiss the information, for judgment of acquittal and for a new trial.

POINTS, AUTHORITIES AND ARGUMENT

POINT ONE

THE CONVICTION OF THE DEFENDANTS FOR MAIL FRAUD VIOLATES THE TENTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE DEFENDANTS DID NOT MAIL, OR KNOWINGLY CAUSE TO BE MAILED, ANY MATTER FOR THE PURPOSE OF EXECUTING A FRAUDULENT SCHEME.

Section 1341, Title 18, United States Code, provides, in pertinent part, as follows:

"Whoever, having devised x x x any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses x x x for the purpose of executing such scheme x x x places in any post office or authorized depository for mail matter, any matter x x x to be sent or delivered by the Post Office Department, x x x or knowingly causes to be delivered by mail according to the direction thereon x x x any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

sufficiency of the criminal accusation

and the evidence this case must be determined under the

following doctrinal principles:

(1) The purpose of the federal mail fraud statute was to prevent the post office from being used to carry schemes to defraud into effect.

(2) The mail fraud statute does not purport to reach all frauds, but only those limited instances in which use of the mails is an integral part of the execution of the fraud -- all other cases are left to be dealt with by appropriate state laws.

(3) Incidental and collateral use of the mails which occurs after the fraudulent scheme has been fully executed does not vest a federal court with jurisdiction under the mail fraud statute.

These principles are laid down in the cases of

Kann v. United States, 1944, 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88;

Parr v. United States, 1960, 383 U.S. 370, 80 S. Ct. 1171, 4 L. Ed. 2d 1277; and

United States v. Sampson, 1962, 371 U.S. 75, 83 S. Ct. 173, 9 L.Ed. 2d 136.

THE CRIMINAL INFORMATION: (T.R. Vol. 1, pp. 19-21)

The substance of the accusation was that on

about March 12, 1964, the defendants devised a scheme to de-
d and obtain money and property by false and fraudulent pre-
s from Phillips Petroleum Company, Inc., by means of un-
horized use of a credit card issued by that company to Allied
ahoma Corporation.

The following acts were alleged to be part of
scheme to defraud:

(1) That the defendants would and did ask
attendant at Saveway 15, a Phillips 66 Gasoline Service Station
Las Vegas, Nevada, whether he would allow them to purchase
omobile tires on credit; (2) that the defendant would and
order and receive three tires for a Lincoln Continental of
alue of approximately $150.00 from an attendant at the Saveway
Service Station, and service to the automobile of a value of
roximately $22.55; (3) that the defendants would and did pay
the automobile tires received and the service provided by
ing the service station attendant a Phillips Petroleum Company
dit card, for which the attendant would and did extend credit
the defendants for the purchase of the tires and service; (4)
t from the credit card, a delivery ticket, also known as a
dit slip, would be and was prepared and would be and was signed
defendant Windom with the name "J. Box" as the customer-obligor

on the invoice, also known as the credit slip; (5) that the credit card would be and was representative of an account of Allied Oklahoma Corporation, which credit card would be and was used by the defendant without the knowledge, without the consent and without the authorization of the Allied Oklahoma Corporation; (6) that the aforesaid invoice also known as a delivery ticket also known as a credit slip would be and was forwarded and caused to be forwarded by defendants by mail from Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri.

Finally, the information set forth that on or about March 18, 1964, at Las Vegas, Nevada, the defendants, for the purpose of executing the scheme, knowingly caused to be placed in an authorized depository for mail matter, in the District of Nevada, a letter to be sent and delivered by the Post Office Department according to the directions thereon, from Saveway Super Stations, Inc., Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri.

B. THE MOTION TO DISMISS:

The defendants moved for the dismissal of the information on the ground it showed on its face that the mailing of the offensive matter was after the fruition and

completion of the alleged fraudulent scheme. (T. R. Vol. 1, p. 22) The motion was argued to the court (T. R. Vol. 2) and denied by the Court (T. R. Vol. 1, p. 3, Docket Entry for 1/26/65).

. THE EVIDENCE:

PHILIP L. COMB testified that in January of 1964 he was employed as the vice-president and general manager of Allied Oklahoma Corporation in Sand Springs, Oklahoma. As such official he had the use of a credit card issued to Allied Oklahoma Corporation by Phillips Petroleum Company. He lost the credit card on January 8, 1964, and notified Phillips Petroleum Company of the loss. (T. R., Vol. 3, pp. 12, 13) He further testified that he had never been in Las Vegas before this trial; that he did not know the defendants and had not authorized anyone named Charles Cornet, Rex Stidham Windom, or J. Box to use his credit card (T. R., Vol. 3, p. 14) and that he did not drive a Lincoln Contintental automobile and had not purchased tires for a Lincoln Contintental automobile at a Phillips 66 Service Station in Las Vegas on March 12, 1964. (T. R. Vol. 3, p. 15)

WILBERT EUGENE ANDERSON testified that in March of 1964 he was employed as a station attendant at

Phillips Station Number 15 in Las Vegas, Nevada. He got a phone call in the evening from a caller who wanted to know if he had a 900-14 tire. He advised the caller the station had such tires and a little while later a green 1956 or 1957 Plymouth drove into the station. There were two men in the car. The driver of the car was defendant Cornet. The driver asked the attendant for the tires and the attendant told them he had them. (T. R. Vol. 3, pp. 19-21) The attendant testified that he recognized the defendant Cornet as the driver of the car, and he believed he recognized he defendant Windom as the passenger in the car. (T. R. Vol. 3, p. 21) The driver of the car told the witness it was a credit card purchase and the other man passed the credit card across to the driver who gave it to the attendant. (T. R. Vol. 3, p. 22) The attendant took the credit card and checked it against the station's "hot list" of stolen or expired credit cards. This credit card was not on the hot list. The two men left in the Plymouth. They were gone a few minutes and then came back with the Plymouth and another car. The defendant Cornet was driving the Plymouth. The other car was a Lincoln. It was a pinkish color, but the attendant did not remember the year of its make. The other man was driving the Lincoln. They gave a work order as to what they wanted done and left. The work order included "a lube

job, change the oil, filters, and the tires." (T. R. Vol. 3, pp. 23-24) The tires were premium action tread white sidewall tires. The attendant (with the assistance of another attendant, John Loveland) installed three tires on the Lincoln, lubed it, changed the oil and filters. That took about two and a half hours and then the men came back to get the Lincoln and the attendant put gas in the Lincoln and he thinks, also, in the Plymouth. (T. R. Vol. 3, pp. 24-25) The attendants took care of the paper work of making out the credit card invoices, the work order slip and tallying it up. The defendant Cornet gave the attendant the credit card but the attendant believed that the defendant Cornet had received the credit card from the other man. (T. R. Vol. 3, p. 25) The tires were mounted on the two front wheels and the left rear wheel. (T. R. Vol. 3, pp. 25-26) The attendant made out two credit slips. The delivery tickets were signed in the presence of this attendant and when asked which individual signed them, he testified "I believe it was the other man, the one on the far end." (T. R. Vol. 3, p. 27) The men didn't want a tire guarantee (T. R. Vol. 3, p. 28). The attendant thought the other attendant (John) had put a service sticker on the car. (T. R. Vol. 3, p. 28)

n March 18, 1964, this attendant gave a statement to the Federal ureau of Investigation regarding the transaction. (T. R. Vol. 3, . 31) The attendant testified as to what he customarily did ith the signed cards: " . . . on the evening shift, when you heck out, you just put it with the inventory slip, the station nventory slip, and you put it in the drawer and the manager of he station, he turns them into the office." (T. R. Vol. 3, . 53)

JOHN S. LOVELAND: He testified that he was lso employed as a station attendant at the Phillips 66 station n the night in question. (T. R. Vol. 3, p. 64) He testified he defendants came into the station for some tires and complete ervice on their car. (T. R. Vol. 3, p. 65) They came in to- ether in a 1956 Plymouth. It was two-tone but he did not recall he color. Wilbur Anderson, the other attendant, was at the tation. Loveland went out to the car to see what they wanted. hey wanted to talk to the other attendant so the other attendant ame out and they had this credit card and they wanted to know f it was good, so the two attendants went in the station and hecked it out on the hot list. (T. R. Vol. 3, p. 66) The efendant Cornet was driving the Plymouth and it was the defendant Cornet who produced the credit card. After being notified the credit card was good the two men left. Later they came back in

Plymouth and the car that the tires were later put on. It as a big brown car. (T. R. Vol. 3, p. 68) This attendant did ot see anyone sign the credit card tickets and didn't know who igned them. (T. R. Vol. 3, p. 70) This attendant said he believed" it was the defendant Windom who told him he wouldn't eed a service sticker and not to take time to put one on. T. R. Vol. 3, p. 71) After further examination the Government rought out that when this witness had given a statement to the ederal Bureau of Investigation on March 20, 1964, the witness ad then stated that it was the defendant Cornet who did not ant a tire guarantee or a mileage sticker put on the car. T. R. Vol. 3, p. 79) This witness had been interviewed by he FBI at his home on the day before the statement was given, arch 19, 1964. (T. R. Vol. 3, p. 94)

CARL LEE BAILEY testified he was a petroleum obber for Phillips Petroleum Company, for the company named aveway Super Service Stations, Incorporated. (T. R. Vol. 3, . 103) It was the practice of this company to use certain orms for the reporting of credit card sales. One of these orms 677(d), marked Government's Exhibit 6, showed that there ere two credit card sales on March 12, 1964 for the credit card umber in question, one for $165.73 and the other for $22.55.

That form carried a total figure of $325.52. Another form, company form number 2275, Government's Exhibit No. 7, dated March 20, 1964, reflected that the credit card sales on the 677(d) form came from the Phillips 66 Service Station in question. (T. R. Vol. 3, p. 109) It was the practice of the station manager to prepare form 677(d) the day following the sale. He did not prepare form 2275 on any particular day, but they were usually prepared two to three times a week. (T. R. Vol. 3, p. 109) After the preparation of form 2275, it was the practice of the petroleum jobber company to take credit for the total amount against any money that the jobber might owe Phillips Petroleum. When the original of the form was folded around the credit cards themselves and they were mailed to the Phillips Petroleum in Kansas City. (T. R. Vol. 3, p. 110) Mr. Bailey also produced a pink slip numbered 004247 which showed that on March 24, 1964, the man who actually mailed the instruments was reimbursed $16.10. (T. R., Vol. 3, p. 110)

CARL EDWARD JORDAN testified that he was assistant office manager, machine division, Phillips Petroleum Company, and was in charge of receiving credit card invoices and their subsequent billing to credit card customers. (T. R. Vol. 3, p. 111) He identified Government's Exhibit Number 8 as a box

having his name, title and date on it: "Carl E. Jordan, Assistant Office Manager, Machine Division, Phillips Petroleum Company, Credit Card Office, Kansas City, Missouri, March 26, 1964." (T. R. Vol. 3, p. 113) He first saw the box when it was emptied out of a mail bag on the company's mail sorting table in its receiving section and at that time he placed his initials on the box, March 26, 1964, and at the same time he placed his initials and the date March 26, 1964 on delivery tickets from Caveway Service, Incorporated, in Las Vegas, which were among the items contained in the box. (T. R. Vol. 3, pp. 113-114) The box was post marked in Las Vegas on March 23, 1964. (T. R. Vol. 3, p. 115) This witness had been instructed by his supervisor to turn the box over to an agent from the FBI, and to identify the fact that he had received it, he placed his name on it. (T. R. Vol. 3, p. 115) This witness had received instructions from his supervisor or his superior officer to return the box when it came in from Las Vegas some three or four days before the time it was received, somewhere around the 20th. (T. R. Vol. 3, p. 116) It was not the practice of the Las Vegas office to mail the forms out at any specific time. ". . . they mail them daily or weekly or whatever they feel like. There is no set time or anything that they have to mail them." (T. R. Vol. 3, p. 119)

JERRY ASHER STATHAM testified he was employed n the credit card office of Phillips Petroleum Company in Kansas ity, Missouri. (T. R. Vol. 3, p. 120) This witness produced form numbered 689 which he designated a bad debt charge-off. e also produced some invoices and from these records testified hey showed a bad debt loss of $316.60. (T. R. Vol. 3, p. 121) overnment's Exhibits 9 and 10 were delivery tickets numbered 92509 and 892510 showing two charge sales from Saveway Station umber 15 on March 12, 1964 -- three tires for $165.73 and a asoline purchase, motor oil, oil filter, lube, air filter for 22.55. (T. R. Vol. 3, p. 123) The witness testified neither f these charges had been paid. (T. R. Vol. 3, p. 123) The itness testified that he was informed on March 18, 1964, he as informed by a phone call from Mr. Smith, an FBI agent in hnsas City, that the credit card was being misused. (T. R. ol. 3, p. 127)

EUGENE LEE DICKINSON testified he lived in klahoma City and that in 1963 he owned an automobile bearing klahoma License Plate No. XW-7139 when he traded it off on ebruary 12, 1964 at Raney's Used Car Lot in Phoenix, Arizona; tat the defendant Windom was present at the car lot and was lving part of the time in an old house back of the garage. (. R. Vol. 3, pp. 132, 133, 134, 135, 136)

ROY REGER, a special agent of the Federal Bureau of Investigation, testified that he arrested the defendant Windom on March 20, 1964 (T. R. Vol. 3, p. 143) at Raney's Used Car Lot in Phoenix, Arizona. At the time of the arrest there was a 1961 Lincoln, light pink sedan parked on the used car lot. The arresting officers examined the Lincoln. They looked for a service sticker but were unable to locate any service sticker on the car. They noticed three tires on the car which appeared to be practically new, two on the front wheels and one of the left rear wheel. These tires were Phillips 66 tires and the writing on these tires indicated that they were premium action tread, low profile, white sidewall nylon tubeless four-ply tires and the size was 900-950 by 14. The tires were removed from the car and placed in the office of the FBI in Phoenix and at the time of the trial were in Las Vegas. (T. R. 144-146) The Lincoln automobile had Arizona dealers plate number 7199 at the time it was examined. This officer testified that at the time of his arrest the defendant Windom stated "I have just got some new tires for my car." (T. R. Vol. 3, p. 148) The defendant Windom told the officer that the pink Lincoln which he was examining belonged to Mr. Raney, and the officer further testified that

e believed someone from his office later verified the fact that
ne automobile did belong to Mr. Raney. (T. R. Vol. 3, p. 148)

. THE MOTION FOR JUDGMENT OF ACQUITTAL:

At the conclusion of the testimony of the
tness Roy Reger, the Government rested and the defendants moved
r judgment of acquittal on the grounds, among others, that the
idence did not establish a scheme to defraud of which any use
the mails was an integral part -- that any fraudulent scheme
s complete before any use of the mails occurred. (T. R. Vol. 3,
ginning at p. 154) The motion was denied. (T. R. Vol. 3, p.
2) After the denial of this motion the defendants rested their
se. (T. R. Vol. 3, p. 174)

AUTHORITIES:

The case of Kann v. United States, supra, held
at where persons cashed checks and received the money which
ey intended to receive under a fraudulent scheme, the fact that
e checks were forwarded by mail from the local bank to the
awee bank for payment by the drawer, did not bring the fraudulent
heme under the mail fraud statute. The court said:

"The remaining contention is that the checks were not mailed in the execution of, or for the purpose of executing, the scheme. The check delivered to the five defendants by the building contractor in payment for

timber they claimed to own was cashed by them at a local bank in Elkton, Maryland. By cashing it they received the moneys it was intended they should receive under the scheme. The Elkton bank became the owner of the check. The same is true of the bonus check delivered to defendant Willis and deposited and credited to his account. The banks which cashed or credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires."

Since one element of the offense defined by the mail fraud statute was lacking, that the mailing must be for the purpose of executing the fraud, the judgment of conviction was reversed.

In Parr v. United States, supra, the defendant
embers of a school board were charged with using the mails to
fraud the school district. Some of the counts related to use
an oil company credit card of the District to procure gasoline
d oil for the personal use of the defendants at the expense of
e District. The convictions of the defendants were reversed
cause the mailings relied on to vest federal jurisdiction, two
voices from the oil company, at Houston, Texas, to the District,
Benavides, Texas, and the check in payment of the invoices
iled from the District to the Oil Company, were not done in
ecution of the fraudulent scheme. The Court said:

" . . . Here, as in Kann, '(t)he scheme in each case had reached fruition' when Carrillo and Garza received the goods and services complained of. 'The persons intended to receive the (goods and services) had received (them) irrevocably. It was immaterial to them, or to any consummation of the scheme, how the (oil company) x x x would collect from the (District). It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.' 323 U. S. at page 94, 65 S. Ct. at page 151" (363 U.S. at page 393, 80 S.Ct. at page 1184)

h court concluded:

". . . the showing, however convincing, that state

crimes of misappropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud, and, under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was nor charged, proven and found guilty in accordance with due process."

Since the decision in Parr, two other "credit d cases" have been reported:

Adams v. United States, CA 5th, 1963, 312 F. 2d 137; and

Kloian v. United States, CA 5th, 1965, 349 F. 2d 291.

In Adams the defendant was charged with using mails to defraud the Gulf Oil Company and one William Magie, holder of a credit card of that oil company. It was proved t the defendant used Magie's credit card without Magie's horization for several months during which time he made some hundred purchases from Gulf distributors in several states. cases of Kann and Parr were considered by the court and held to be decisive of this case because all of the various sales e to the defendant were but part of "one unitary scheme" and t "numerous mailings occurred before the scheme, taken as a le, was consummated." The court also held that the use of mails to forward the sales slips occasioned a delay in the

detection of the defendant's scheme to defraud, which permitted him to expand the scope of his operations.

In Kloian, the defendant moved for post-conviction relief on the ground the Information charging mail fraud to which he plead guilty did not charge an offense. The Information charged that the defendant made two separate purchases with attendant mailings, and that the period of the purchases was spread over a period of approximately two weeks. The court held the case came under the ruling of Adams and upheld the conviction.

The United States Court of Appeals for the Ninth Circuit has also had occasion to speak on the issues involved:

In Merrill v. United States, CA 9th, 1938, 95 F.2d 669, a mail fraud conviction was reversed where the letters relied on to prove use of the mails in execution of the fraud were all written after the latest allegedly fraudulent stock sale. There being no evidence that the fraudulent scheme was still in existence at the time the letters were delivered, it obviously could not be said that the letters were delivered for the purpose of executing the scheme. The court also held that there was no presumption that the fraudulent scheme continued after the stock sale ceased. The defendants did not have the burden of proving the termination of the scheme. Instead, the

burden was on the Government to prove not only that the scheme had once existed, but that it was still in existence when the indictment letters were delivered.

It is not subject to dispute under the foregoing authorities that under the mail fraud statute, the basis of federal jurisdiction, and the gist of the crime, is the use of the postal facilities in the execution of or the attempted execution of a fraudulent scheme. When the fraudulent scheme charged against the defendants has been completed and the defendants have received the fruits thereof before any use of the mails occurs, as this Court said in Merrill v. United States, supra, "it obviously cannot be said that the letters were delivered for the purpose of executing the scheme."

The only basis upon which the conviction of the defendants was upheld in Adams v. United States, supra, and Kloin v. United States, supra, was that the scheme involved a continuing use of the credit card over an extended period of time. There are no facts in evidence in the present case which can be looked to to bring this prosecution under the rule of those cases. On the contrary, the fraudulent scheme charged in the information and the evidence relied on to support it related to a single, isolated instance of the obtaining of automobile

tires and service to an automobile through the unauthorized use of an oil company credit card. The property and services were rendered and received by all the proof at Las Vegas, Nevada on March 12, 1964. No use of the mails occurred until March 23, 1964, (T. R. Vol. 3, pp. 115), the date of the postmark on the mail matter.

By the date of March 23, 1964, not only had the fraudulent scheme charged been fully completed for eleven days, but the defendants had already been complained against and had been arrested on March 20, 1964, three days before the use of the mails occurred. (See the Statement of the Case)

These extraordinary circumstances, dealt with in detail under the following Point, bring out the hard kernel of truth in this case, that the use of the mails relied on to support the conviction of the defendants was knowingly caused by the Government itself for the purpose of federal prosecution.

Finally, it should be noted that the offense of obtaining goods, property, services or anything of value by the unauthorized use of a credit card is one which is specifically defined and made punishable by the Law of Nevada under Chapter 83 of the Laws of 1965, amended Chapter 205 of the Nevada Revised Statutes. The text of this law is set forth

in Appendix A attached hereto.

POINT TWO

THERE IS NO SUBSTANTIAL EVIDENCE THAT THE DEFENDANTS USED THE MAILS OR KNOWINGLY CAUSED THE MAILS TO BE USED.

A USE OF THE MAILS MADE AT THE DIRECTION OF AND UNDER THE SUPERVISION OF GOVERNMENT AGENTS IS NOT IMPUTABLE TO THE DEFENDANTS.

INCIDENTAL OR COLLATERAL USE OF THE MAILS MADE BY OTHERS THAN THE DEFENDANTS WILL NOT SUPPORT A CONVICTION OF MAIL FRAUD.

The chronology of events in this prosecution is extraordinary. Probably no other case like it exists.

On March 12, 1964, according to the witnesses Anderson and Loveland, the station attendants at a Phillips 66 Service Station in Las Vegas, Nevada, two persons obtained automobile tires and service from the station. One of the men produced an oil company credit card, and the transaction was handled as a credit card transaction. The credit card was checked by one of the attendants against the company's "hot list" and did not appear thereon. (The testimony of these witnesses is set forth in more detail and with references to pages of the transcript of record under Point One hereof)

On March 18, 1964, the service station attendant Anderson gave a written statement to the FBI (T. R. Vol. 3, p. 31). The same day, March 18, 1964, the witness Statham, who was employed in the credit card office of Phillips Petroleum Company in Kansas City, Missouri, was informed by a phone call from Mr. Smith, an FBI agent in Kansas City, that the credit card involved in the transaction was being misused. (T. R. Vol. 3, p. 127)

On March 19, 1964, the witness Loveland, the other service station attendant was interviewed at his home by the FBI, and on the following day, March 20, 1964, Loveland gave a written statement to the FBI (T. R. Vol. 3, p. 79).

On March 20, 1964, a criminal complaint was filed with the United States Commissioner for the District of Nevada charging the defendants with the commission of the crime of mail fraud. (T. R. Vol. 1, pp. 7-10). (The allegations of the complaint are exactly the same as the allegations of the criminal information which was filed on May 1, 1964, except that in the criminal information the value of the service for the automobile was alleged to be approximately $22.55) It was charged in the complaint that:

"7. It was a further part of the scheme and artifice to defraud that on or about March 18, 1964,

the aforesaid invoice also known as a delivery ticket also known as a credit slip would be and was forwarded and caused to be forwarded by defendants Windom and Cornet by mail from Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri.

8. On or about March 18, 1964, at Las Vegas, Clark County, State and District of Nevada, defendants Windom and Cornet, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused to be placed in an authorized depository for mail matter in the District of Nevada, a letter to be sent and delivered by the Post Office Department according to the directions thereon from Saveway Super Stations, Inc., Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri." (T. R. 1, p. 9-10)

The complainant, Orville F. McVay, Special Agent Federal Bureau of Investigation, set forth as one of the matters showing probable cause the following:

"3. Jack Cason, Saveway Super Stations, Inc., Las Vegas, Nevada, advised said credit slips reflecting the purchase of the tires and services were mailed to Phillips Petroleum Company, Inc.,

Kansas City, Missouri, on or about March 18, 1964." (T. R. 1, p. 10)

On March 20, 1964, the defendant Cornet was arrested in Las Vegas, Nevada and his bail was fixed at $5,000.00 (T. R. Vol. 1, p. 6).

On March 20, 1964, the defendant Cornet was arrested in Phoenix, Arizona and taken before the United States Commissioner there where his bail was fixed at $5,000.00. (T. R. Vol. 1, p. 11)

About March 20, 1964, the witness Carl Edward Jordan, assistant office manager, machine division, Phillips Petroleum Company in Kansas City, Missouri, was instructed by his supervisor or superior officer to retain mail matter when it arrived from Las Vegas, Nevada. (T. R. Vol. 3, p. 116) It was not the practice of the Las Vegas office to mail the forms out at any specific time; ". . . they mail them daily or weekly or whatever they feel like. There is no set time or anything that they have to mail them." (T. R. Vol. 3, p. 119)

On March 24, 1964, an individual who purportedly mailed the matter relied on was reimbursed $16.10 according to the testimony of the witness Carl Lee Bailey, the Phillips Petroleum Company jobber for Saveway Super Service Stations, Incorporated. (T. R. Vol. 3, p. 110).

Mr. Bailey testified that after the service tation attendants collect the credit card slips and tally them n the company's form 677(d), they are sent to the office of aveway, then they are listed on a recap sheet, Saveway takes redit for the total amount against any money it might owe Phillips etroleum, then the form with the credit card slips is mailed to hillips Petroleum in Kansas City. (T. R. Vol. 3, pp. 105, 110)

On March 26, 1964, the witness Carl Edward ordan, Phillips' assistant office manager in the machine ivision, received and marked for identification a box addressed o him and bearing a postmark in Las Vegas on March 23, 1964 T. R. Vol. 3, pp. 113-115) which box, under instructions from he agent from the FBI he dated and initialled for identification, T. R. Vol. 3, p. 115) and then opened and marked the credit rd slips for identification as directed by the FBI agent. T. R. Vol. 3, p. 114-116)

Finally, the witness Strathan testified from e records of Phillips Petroleum that the charges for the tires d automobile service had not been paid and constituted part o a total bad debt loss of $316.60 on form number 689 designated abad debt charge-off. (T. R. Vol. 3, pp. 121-123)

The foregoing matters of record establish

hat the mailing relied upon was directly caused by agents of he United States Government and its progress was superintended o its destination where an agent of the United States Government as on hand to specify how it should be marked for identification nd to take delivery of it. The mailing relied upon to convict hese defendants did not occur until three days after the de- endants had been arrested and charged with the crime of making hat mailing!

Agents of Saveway 15, and Phillips Petroleum ompany, knew, as early as March 18, 1964, that an unauthorized se had been made of the credit card.

The record does not establish where the re- ponsibility of loss normally falls in connection with unauthorized redit card sales. Here, as always, it was the burden of the Government to prove its case against the defendants.

What the record does establish is that an istance of misuse of a credit card came to the attention of the FI and its agents, who, after they had procured the arrest of te defendants, then effected the use of the mails in order to posecute the defendants.

The case is analogous to cases of entrapment were an over-zealous agent of the Government, bent on bringing hme a case to be prosecuted, will himself perform an act which is

an element of the crime and without which the crime is not complete. This occurred in the case of:

DeMayo v. United States, CA 8th, 1929, 32 F.2d 472. The defendant was convicted of conspiracy and of introducing intoxicating liquor into Indian Territory in Oklahoma. One Kelsey was a feigned conspirator, who was acting as a representative and agent of United States prohibition officers. It was Kelsey who performed the vital overt acts of carrying the liquor into the Indian Territory on Oklahoma. The court held that Kelsey's acts could not be relied on as overt acts to make out a case of conspiracy, and could not be relied on to prove the substantive crime. The court said:

> " . . . we are of opinion that government officers should not so far participate as themselves to perform unaided by any of the conspirators the crucial acts of introducing the liquor into the forbidden territory. They may properly afford opportunity to those suspected of crime to commit the original offense. They may be participants to a certain extent, but they, themselves, may not unaided, as in this case, do the very overt act which is essential to the consummation of the offense charged."

The court quoted with approval the decision in State v. Jansen, 22 Kan. 498:

> "The act of a detective may, perhaps, not be imputable to the defendant, as there is a want of a community of motive. The one has a criminal intent, while the other is seeking the discovery and punishment of crime. But where each of the overt acts going to make up the crime charged, is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt or what acts may be done by the party who is with and apparently assisting him. Counsel have cited and commented upon several cases in which detectives figured, and in which the defendants were adjudged guiltless of the crimes charged. But this feature distinguishes them, that some act essential to the crime charged, was in fact done by the detective, and not by the defendant; and this act not being imputable to the defendant, the latter's guilt was not made out. Intent alone does not make crime. The intent and the act must combine; and all the elements of the act must exist and be imputable to the defendant."

See also, State v. Neely, Montana, 1931, 300 P. 561; People v. Lanzit, Cal. App. 1925, 233 P. 816.

Another instructive case is that of United States v. Eman Mfg. Co., Dist. Ct. Colo, 1920, 271 F. 353, where it was held that the manufacturer of a certain medicinal preparation alleged to have been misbranded could not be convicted of shipping a misbranded article in interstate commerce where the only shipment of such character shown was on an order sent from another state for the purpose of entrapment by a government agent, who had no reason to suppose the defendant had ever previously made such a shipment. Relying on the case of Woo Wai v. U.S., 223 Fed. 412, 137 CCA 604, among others, the court held in the interests of sound public policy the defendant should not be convicted.

As was said in the cases of:

Butts v. United States, CA 8th, 1921, 273 F. 35; and

Newman v. United States, CA 4th, 1924, 299 F. 128,

> "The first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

Proof that the defendant mailed, or directly caused to be mailed, the objectionable matter, is crucial to prove the crime of mail fraud and federal jurisdiction over the

offense. Mere proof that a letter or other matter was received through the mail is not proof that the defendant mailed it. This is illustrated in the case of Davis v. United States, CA 3rd, 1933, 63 F. 2d 545. There the defendant made out a false financial statement which he delivered to another. The person who received the statement was to show it to his employer and then give it to a certain board of trade. Contary to the original intention of the person who received the false statement, instead of personally delivering it to the board of trade, he mailed it. The court held this was not sufficient to support a conviction for use of the mails to defraud by the person who had prepared the false statement:

> "Thus the sole question is whether that was enough evidence on which to submit the issue of mailing. This court in Freeman v. United States, 20 F.2d 748, 750, Berliner v. United States, 41 F.2d 221, 22, and Cohen v. United States, 50 F.2d 819, 821, ruled in effect that the charge of mailing, an essential element of the offense, particularly important because it is also the jurisdictional element, must be approved, and that a letter was received through the mail by one person is not proof that it had been mailed by the

defendant. In other words, to justify submission of the question of mailing by the defendant there must be evidence of that fact, direct or circumstantial."

o the same effect see United States v. Dale, 230 F. 750, Cal. 915.

It is respectfully submitted that this crucial roof that the defendants mailed or caused to be mailed the matter elied upon is not present in this case, and the lower court erred n refusing the defendants' motions for acquittal and in submitting he case to the jury.

The error in submitting the case to the jury as compounded and exaggerated by the giving by the Court of the llowing instruction:

"You will note that the information charges that as a part of the scheme and artifice to defraud that a letter was caused to be mailed from Las Vegas, Nevada to Phillips Petroleum Company, Kansas City, Missouri, on or about the 18th day of March, 1964. The proof in this case, as I recall it, and what it actually is, of course, is up to you, was that it wasn't a letter that was mailed, but it was a box. I instruct you that this is immaterial as long as

matter than can be mailed was mailed, and that the mailing did not happen on the 18th of March, as charged, but sometime after the 23rd, between the 23rd and the 26th, and again this is my recollection of the evidence, and the final determination is up to you. I instruct you that if you so find that there are these variances, these differences between the information and the proof, that these are immaterial variances, they are of no consequence and should not cause you any difficulty during your deliberations." (T. R. Vol. 3, p. 219)

If there was any substantial evidence that the defendants effected the use of the mails relied on for conviction, then the factual determination of the question lay within the province of the jury. It is respectfully submitted that the effect of the foregoing instruction was to remove that crucial factual issue from the consideration of the jury. The giving of this instruction was objected to by the defendants in the following language:

"MR. CLAIBORNE: We would object to the Court's giving of the instruction on variance as to the dates between March 18th and the date of mailing, March 23rd, because the date of the mailing is the

essence of the crime of mail fraud. The variance of the date was known to the Government at least by the time the information was filed, and misleads the defendants and did mislead the defendants in their defense in this matter, did not properly notify them of the charge, or any matter which would enable them to properly defend in this case. And further, that the instruction is not the law as to variance. Variance as to an offense of a few days most assuredly is of no concern, yet in this matter, it is inasmuch as the defendants were arrested prior to the mailing of the objectionable matter. That is, March 23rd, 1964, and the variance in this regard is material. Furthermore, the Court instructed the jury specifically that this objectionable matter that was mailed on March 23rd should not give them any concern in their deliberations in the jury. Thusly, the Court instructed the jury to the effect that they could disregard this variance and they may also take into consideration a variance of proof on the part of the prosecution in their deliberations and considerations, and to be told that they should pay no attention to it, we believe, is error. (T. R. Vol. 3, pp. 227-228)

THERE WAS NO EVIDENCE OF SUBSTANCE TO CONNECT THE DEFENDANTS WITH THE PERPETRATION OF A FRAUDULENT SCHEME.

The defendants respectfully submit that there was no redible, reliable or substantial evidence to connect them with he perpetration of the fraud in the unauthorized use of a credit ard or in the receipt of the fruits of such fraud.

The record shows that three automobile tires and service o an automobile by unauthorized use of an oil company credit ard were obtained from a Las Vegas service station. Beyond that, ll that is shown is that two recalcitrant witnesses, who were mpeached by the Government, made faulty and conflicting identi- ication of one of the defendants as having been present at the illing station. All the rest of the testimony which can be ooked to to support the conviction is circumstantial, and the rcumstances relied on, under the authorities hereinafter set rth, are more consistent with innocence than they are with guilt.

The evidence which tends to support the conviction is reinafter set forth:

The witness ANDERSON, who was the service station at- ndant who handled the credit card transaction, was asked if recognized either of the defendants, and he responded:

"A. Yes, sir, I recognize one of them.

Q. Which one, please?

A. The one on the right.

correct?

A. Right.

MR. DE FEO: The record will show that Mr. Anderson is indicating Mr. Charles Cornet, please.

Q. (By Mr. De Feo) Now, do you recognize either of the other gentlemen at this table?

A. (By the Witness) I believe I recognize the other one, but I am not positive.

Q. Which other one is that?

A. The one on the far end.

MR. DE FEO: The record will indicate that he is indicating Mr. Rex Stidham Windom.

Q. (By Mr. De Feo) Now, you say you believe you recognize him, but you are not positive; is that correct?

A. (By the witness) That is correct, sir." (T. R. Vol. 3, p. 21).

The witness ANDERSON testified that the defendant Cornet was driving the Plymouth. Cornet wanted to know if the witness had any tires and the witness told Cornet he did, and Cornet told the witness it was a credit card purchase and the "other man" passed the credit card across to the driver who handed it to the witness (T. R. Vol. 3, p. 22). Anderson checked the credit card against the station's "hot list" and then the two men left. They were gone a few minutes and then came back with another car--the Plymouth and another car. Mr. Cornet was driving the

lymouth. The other car was a Lincoln (T. R. Vol. 3, p. 23). he witness said the Lincoln was "pinkish" but he didn't know he year of its make. "The other man" was driving it. The ires which were installed on the Lincoln were "just premium ction tread, whitewall." (T. R. Vol. 3, p. 24). The witness believed" the tires were installed on the two front wheels nd the left rear wheel (T. R. Vol. 3, p. 25-26). The witness as asked which individual signed the credit card slips. He esponded: "I believe it was the other man, the one on the ar end." (T. R. Vol. 3, p. 27)

At this juncture, the Court itself commented: "I don't know nether you are making a very good record of identification.")

The Government attorney made another effort to establish he identity of the person who signed the credit card slips:

"Q. Now, you stated that the signature 'J. Box' appearing on that card is not in your handwriting; is that correct?

A. That's right, sir, it isn't.

Q. Which individual do you believe placed it thereon?

A. I believe the man on the far end." (T. R. Vol. 3, p. 28)

The Government made a still further attempt to establish te identity of the person who was driving the Lincoln automobile. T do this, he had to resort to a written statement made by an FI agent and signed by the witness ANDERSON. Over the objection o the defendants, the Government was allowed to read a portion o the statement as follows:

"Both men left in the Plymouth and returned in about twenty minutes. The same man, whom I will refer to as number 1, was driving the Plymouth again. The other man, whom I will refer to (interruption by the Court) The other man, whom I will refer to as number 2, was driving a late model Lincoln Continental, probably a 1961 or 1962 model. It was a hardtop car and was what I call sandy pink in color." (T. R. Vol. 3, pp. 36-37)

Still struggling to establish identification, the rosecutor once again tried to get the witness to identify he defendant Windom:

"Q. (By Mr. De Feo) Now, Mr. Anderson, I'd like to ask you again with regard to the identification of the Defendants in this case, whether you are sure that Mr. Windom, the gentleman at the end of counsel table, was one of the gentlemen who came into the station that night.

A. (By the witness) I wasn't sure, no sir." (T. R. Vol. 3, p. 37)

On cross examination the witness said he did not recall pecifically saying to the FBI agent that the automobile was robably a 1960 or '61 model Lincoln (T. R. Vol. 3, pp. 38-39) he witness further stated that he was not positive who signed he credit card slips--that it could have been either one of hose individuals (T. R. Vol. 3, p. 41); that he was not sure

who the number 2 man was, and never was, and that he had so informed the FBI agent who took the statement (T. R. Vol. 3, p. 42). The tires all had a serial number, but the attendant did not make a note of what those serial numbers were (T. R. Vol. 3, pp. 47-48).

The Government moved to re-open direct questioning and then asked the witness who wrote down the license number "Oklahoma XW 7139" on the credit card slips. The witness said he had written it and had gotten the information from looking at the rear of the car (T. R. Vol. 3, p. 58).

Next, on redirect examination, this witness testified that his best recollection was that the "number 2 man" was the man who came into the station and signed the credit card slips. (T. R. Vol. 3, p. 59).

On recross examination the witness testified that he did not fill in the year of the license plate on the credit slip--that it was his practice never to fill in the year--and that he had not looked to see what the year was. (T. R. Vol. 3, p. 60)

The witness LOVELAND, the other service station attendant, testified that he recognized the defendants. (T. R. Vol. 3, p. 65) He testified that the defendant Cornet produced the

credit card, but the witness didn't see where it came from (T. R. Vol. 3, p. 67). This witness said the tires were installed on a big, brown car (T. R. Vol. 3, p. 68). Throughout this witness's testimony he said he did not see who signed the credit card slips and did not know.

Over the objection of defendants, this witness, who had re-read the statement he gave to the FBI the day before giving his testimony, was allowed to read it again, in order to "refresh his memory" about what kind of a car it was that the tires were installed on. Then he "recalled" that the car was a Lincoln, but he still testified that it was "dark brown" in color. (T. R. Vol. 3, p. 77)

This witness testified that he was sure he recalled which of the two men had told him they wouldn't need a service sticker and that it was the defendant Windom. He said he didn't know which one said they wouldn't need a tire guarantee (T. R. Vol. 3, p. 75). The witness was allowed to "refresh his memory" by again reading the statement he had given to the FBI, over the defendants' objections, and then the witness testified that he saw what was in the statement, but "as I told you, just few minutes ago, I don't know which one" told him about not needing the tire guarantee (T. R. Vol. 3, p. 78).

The Government was then allowed to read into evidence the following portions of the statement "as evidence of a past recollection recorded," over the objection of the defendants:

"I do not recall the exact name of the tires but they were Phillips brand tires and had white sidewalls and were expensive tires. They were of the size usually placed on a Lincoln automobile.

"As I recall, the number 1 man did not want a tire guarantee nor did he want a mileage sticker put on the car." (T. R. Vol. 3, p. 79).

The witness then testified that the man he had referred o as the "number 1 man" was the defendant Cornet. (T. R. ol. 3, p. 80)

Counsel for defendants moved that the statement read nto evidence be stricken on the ground the Government had een allowed to impeach its own witness. This motion was enied. (T. R. Vol. 3, p. 80)

On cross examintion the witness testified that he didn't how for sure but he recalled that two tires were mounted n the driver's side and one was mounted on the other side (. R. Vol. 3, pp. 88-89).

The witness DICKINSON testified that in 1963 he owned a '5 Lincoln four-door automobile with Oklahoma license plate nmber XW-7139 (T. R. Vol. 3, p. 132). He traded this atomobile on February 12, 1964, to a used car lot which he ientified as "Rakin Brothers Used Car Lot." (T. R. Vol. 3, p 134). The prosecutor then continued to question him abut "Raney" Brothers, located in Phoenix, Arizona (T. R.

Vol. 3, p. 134). This witness testified that he saw the defendant Windom around the car lot where he traded off his car. (T. R. Vol. 3, p. 135) He testified that he worked a brief time at this car lot and observed the defendant Windom "staying around there in the back of the garage, back there, kind of a real old house, part time." (T. R. Vol. 3, p. 136) This witness testified on cross examination that the owner of Raney Motors was Jack Raney and that he didn't know what Mr. Windom was doing at the car lot. (T. R. Vol. 3, pp. 139-140)

Finally, the witness, REGER, special agent for the FBI testified to arresting the defendant Windom at Raney's Used Car Lot in Phoenix, Arizona. He testified that at the time of the arrest a 1961 Lincoln, light pink sedan was parked on the used car lot. Defendant Windom, upon inquiry by the officers, told them that the manager of the car lot was out of town and that Mr. Windom was running the car lot. The officers asked defendant Windom if they could examine the Lincoln automobile. Defendant Windom said he had no objection. (T. R. Vol. 3, p. 144) Defendant Windom was also reported by the officer to have volunteered the statement that he had just gotten some new tires for his car. (T. R. Vol. 3, pp. 144-145) The officers examined the Lincoln looking for a service sticker, but were unable to locate any service sticker

on the car. They saw three practically new Phillips 66 tires on the Lincoln, and the writing on the tires indicated that they were premium action tread, low profile, white sidewall nylon tubeless four-ply tires and the size was 900-950 by 14. (T. R. Vol. 3, p. 145) After defendant Windom had been taken to the Marshal's office, he said the Lincoln which the officers had seen on the lot had been signed over by him, the title had been signed over by him to Mr. Raney prior to his most recent trip to Las Vegas, Nevada. (T. R. Vol. 3, p. 145)

On cross examination it was brought out that when Mr. Windom stated "I have just got some new tires for my car" he didn't point at the Lincoln and he didn't tell the officers what automobile he had reference to. Someone from the FBI office did verify the fact that the automobile did belong to Mr. Raney. The Lincoln had Arizona dealers license plate number 7199. (T. R. Vol. 3, p. 148-149)

The foregoing recitation of the of the testimony is somewhat lengthy, but every effort has been made to extract from the record everything that the Government can rely upon to support the conviction.

When this evidence is sifted down, all that remains is partial and contradictory identification of the defendant Cornet having been at the service station. A great

ffort was made by the Govermment to identify the defendants, ven to the extent that the Government was allowed to impeach oth of the service station attendants on the basis of statements ritten out by FBI agents and signed by these witnesses.

A great effort was also made, without success, o connect the defendant Cornet with a pink Lincoln Continental utomobile and the circumstance that there was a pink Lincoln at he used car lot where the defendant was arrested which had three hillips 66 tires on it.

Despite all this effort, however, we are dealing ere with a case in which there were multiple means of establishing dentity of the perpetrators of the fraud at the disposal of the overnment. The means of identification by fingerprints on the rucial credit card slips (and it appeared this means was un- atisfactorily employed, since the exhibits were blurred and the estimony was that they were not blurred when they were received n Kansas City (T. R. Vol. 3, p. 118); the means of indentification y handwriting analysis to show who wrote the name "J. Box"; stablishing the tires on the Lincoln Continental were those sold y Saveway Station 15 by use of the serial number on the tires; nd finally, establishing who owned the Lincoln at the time of he occurrence charged, although here again it appears this would t have helped the Government, as the investigation officer Reger

testified someone at his office verified the fact that a Mr. Raney owned the automobile at the time of the arrest.

The defendants respectfully submit that the foregoing evidence simply does not constitute substantial proof identifying the defendants as the perpetrators of the acts charged, and the lower court erred in refusing to grant the defendants' motion for acquittal and in refusing to grant the defendants' motion for a new trial.

The following cases are comparable to the case on this appeal. While each case must turn on its own facts, the failure of the witnesses to make credible identification of the defendants as to the persons at the service station, and the inadequacy of the circumstantial proof relied on to trace the fruits of the fraud into the hands of the defendant, come clearly within the rules of these cases and require the reversal of the convictions of the defendants.

People v. Widmayer, 1948, 402 Ill. 143, 83 N.E. 2d 285;

Johnson v. State, Tex. Crim. App., 1950, 235 S.W.2d 180;

State v. Bradley, 1954, 267 Wis. 87, 64 N.W.2d 187;

State v. Hampton, Mo. 1955, 275 S.W.2d356.

POINT FOUR

BY REASON OF THE MISCONDUCT OF THE UNITED STATES ATTORNEY IN THE MAKING OF HIS CLOSING ARGUMENT TO THE JURY, THE COURTS REFUSAL TO DECLARE A MISTRIAL,

AND BY REASON OF THE REFUSAL OF THE LOWER COURT TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANTS' REQUESTED INSTRUCTION NO.8, THE DEFENDANTS ARE ENTITLED TO A NEW TRIAL.

During the closing argument of the Government, it was several times objected that the Government's attorney argued to the Jury matters which were not in evidence or misstated the evidence to the jury:

Specifically, the United States Attorney argued to the jury facts not in evidence that the Government's handwriting expert couldn't possibly say that defendant Windom wrote the signature "J. Box" because only four letters appear in the signature. (T. R. Vol. 3, p. 198-199) There was no testimony whatever to support this statement. Secondly, the United States Attorney stated in his argument that no fingerprints would appear on the credit card slip because of the manner in which the slip would be handed to the customer. (T. R. Vol. 3, p. 200) Next, the United States Attorney challenged the "seriousness" of the contentions of the defense on the ground the two exhibits consisting of signatures of the name "J. Box" were taken from each of the service station attendants while they were on the stand, and the defendants rested without putting

these exhibits in evidence. (T. R. Vol. 3, p. 201) Next, the jury was told that if the defense was serious in its contention concerning the fact the serial numbers of the tires were not placed in evidence, that counsel for the defendants could have demanded from the witness Bailey, or the FBI agent the serial numbers in question. (T. R. Vol. 3, p. 203)

At the conclusion of this closing argument, the prosecutor finally stated "(This case) was brought because the Government honestly believes the defendants are guilty and deserved to be punished . . ." (T. R. Vol. 3, p. 206)

At the end of the argument the defendants moved for a mistrial on the ground of misconduct on the part of the United States Attorney in his argument. (T. R. Vol. 3, p. 206) The motion was denied.

The closing argument is of such a length that it cannot be set forth herein, but the defendants respectfully request that the members of this court read the same in its entirety, together with the record of objections and argument made by the defendants before the lower court at the time of trial and on argument of their motion for a new trial. (T.R.Vol.4)

Following the argument, the defendants submitted their proposed instruction No. 8 to the Court:

"You are instructed that you may have the testimony of any witness read to you upon your request, if there

is conflict in your minds as to what any witness may have testified to during the trial."

he instruction was refused by the court which stated:

"THE COURT: I have rejected Defendants' proposed Instruction 8, first, because it is presented too late, presented for the first time after the close of argument, and secondly because I think it would tend to encourage the jury to ask that certain testimony be read back."

he defendants made the following objection to the refusal of he court to give proposed Instruction No. 8:

"We object to the Court's failure to give Instruction Number 8 on the following grounds: The United States Attorney has flagrantly intentionally and with total disregard of the constitutional rights of these Defendants, misquoted the evidence, not unintentionally, and not by error or oversight, on three separate occasions. This we maintain was, as I said, not unintentional or not just error on his part, but a deliberate calculated planned attempt on his part to misquote evidence to the prejudiced of these Defendants, which we think is reprehensible. We think it is not only grounds for a mistrial of this matter, we think this jury should have been instructed and this

Instruction Number 8 given, instructing them that they have the right to have any testimony where there was a conflict in their minds as to what the witness said read back to them. In this case it is a necessity, because they still do not know, as they sit there in the jury box, who was telling the truth. They may believe every word that Mr. De Feo said in his misquotation of the evidence, and accept his word because he is an officer of the Government. They are very likely to accept his word, as he well knew, or otherwise he wouldn't have made the remarks.

Furthermore, they were made at a time in his closing summation when it was impossible for counsel to answer them, which further leaves the impression with the jury at this time that since he is an officer of the Government and they were not answered, that they must be -- his version must be true, so we believe that inasmuch as these sharp conflicts between his argument as to what the evidence was and mine, this jury should be so advised."

er the making of the objection the Court indicated for the ord a further gound for rejecting the instruction:

"THE COURT: Before you go on to another objection, counsel, I'd like to further indicate for the record, I'd like to indicate for the record a further ground for rejecting

Defendants' proposed 8; that insofar as the ground just stated by Mr. Claiborne, Mr. Claiborne himself, in his closing argument, touched on many matters outside of the record and it would have been proper for the Government counsel to have objected and I would have sustained such objection but Government's counsel apparently preferred to meet fire with fire and then also went outside the record in his closing argument, but under the circumstances, considering the arguments of both Defense counsel and the closing argument of Government's counsel, I see no error and I saw no grounds for a mistrial and I see no reason for calling to the jury's attention particularly the fact that they would have the right to have testimony, or part of it, read back to them by the court reporter."

s to the timeliness of the tendering of the instruction, the efendant pointed out to the Court that the instruction was not ndered prior to the arguments because counsel for the defendants il not and could not anticipate misconduct on the part of the r.ted States Attorney.

The error was argued to the Court again at h hearing on the defendants' motion for a new trial (T. R. Vol. , pp. 5-9) and again the application for a trial free from

prejudicial misconduct of the Government's attorney was denied. (T. R. Vol. 4, p. 9)

It is contended by the defendants that they were deprived of a fair and impartial trial by reason of the misconduct of the United States Attorney in his closing argument to the jury. It is also contended that the trial court committed reversible error in refusing to instruct the jury in accordance with the Defendant's Proposed Instruction No. 8.

The cases of State vs Teeter, 1948, 65 Nev. 584, 200 Pac 2d 657; Benham v. United States, CA 5th, 1954, 215 F.2d 472, and Wagner v. United States, CA 5th, 1959, 263 F.2d 877, are illustrative of the standard of conduct to which a Prosecuting Attorney is held in a criminal prosecution and the necessity of according the defendants a trial which is free from the misconduct of the prosecutor in his argument to the jury.

CONCLUSION

On the basis of the errors hereinabove set forth, and under the controlling authorities, it is respectfully submitted that the conviction of the defendants must be reversed and the case dismissed, or in the alternative, that the defendants be accorded a new trial free from error.

Respectfully submitted,

HARRY E. CLAIBORNE

CERTIFICATE:

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I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full conpliance with those rules.

HARRY E. CLAIBORNE
108 South Third Street
Las Vegas, Nevada
Attorney for Appellants

STIPULATION AND PROOF OF SERVICE

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IT IS HEREBY STIPULATED by and between counsel for the parties hereto that three copies of the Appellants' Opening Brief have been received by the undersigned Attorney for the United States, and that he expressly waives objection to the filing of the foregoing brief in the said court after the date of January 1, 1966, and stipulates that the same may be timely filed upon receipt thereof by the Clerk of the said Court.

HARRY E. CLAIBORNE
Attorney for Appellant

JOHN W. BONNER, United States Attorney

By: _____
ROBERT S. LINNELL

AN ACT to amend chapter 205 of NRS, relating to crimes against property, by adding a new section defining terms, prohibiting theft, forgery, alteration, counterfeiting, circulation or sale of stolen credit cards and fraudulent use of revoked or canceled credit cards, and providing penalties; and providing other matters properly relating thereto.

[Approved March 2, 1965]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 205 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. As used in this section:

(a) "Cardholder" means the person or organization to whom a credit card is issued or for whose benefit it is issued.

(b) "Credit card" means any instrument, whether in the form of a card, booklet, plastic or metal substance, or the number or other identifying description thereof, which is sold, issued or otherwise distributed by a business organization or financial institution, for the use by the person or organization named thereon for obtaining on credit goods, property, services or anything of value.

2. Any person who:

(a) Steals, takes or removes a credit card from the person or possession of the cardholder, or who retains or secretes a credit card without the consent of the cardholder, with the intent of using, delivering, circulating or selling or causing such card to be used, delivered, circulated or sold without the consent of the cardholder, is guilty of a misdemeanor.

(b) Has in his possession or under his control or who receives from another person any forged, altered, counterfeited, fictitious or stolen credit card with the intent to use, deliver, circulate or sell it, or to permit or cause or procure it to be used, delivered, circulated or sold, knowing it to be forged, altered, counterfeited, fictitious or stolen, or who has or keeps in his possession any blank or unfinished credit card made in the form or similitude of any credit card, with such intent, is guilty of a misdemeanor.

(c) Has in his possession, or under his control, or who receives from another person a credit card with the intent to circulate or sell it, or to permit or cause or procure it to be used, delivered, circulated or sold, knowing such possession, control or receipt to be without the consent of the cardholder or issuer, is guilty of a misdemeanor.

(d) Delivers, circulates or sells a credit card which was obtained or is held by such person under circumstances which would constitute a crime under paragraphs (a), (b) or (c) of this subsection, or permits or causes or procures to be used, delivered, circulated or sold, knowing it to be obtained or held under circumstances which would constitute a crime under paragraphs (a), (b) or (c) of this subsection, is guilty of a misdemeanor.

(e) With intent to defraud, either forges, materially alters or counterfeits a credit card is guilty of a felony.

(f) Knowingly uses or attempts to use for the purposes of obtaining goods, property, services or anything of value a credit card which was obtained or is held by the user, under circumstances which would constitute a crime under paragraphs (a), (b) or (c) of this subsection, is also guilty of a misdemeanor if the total amount of goods, property or services or other things of value so obtained by such person does not exceed $100, or is also guilty of a felony if the total amount of goods, property or services or other things of value so obtained by such person exceeds $100.

3. Every person who knowingly and with intent to defraud uses for the purpose of obtaining goods, property or services, or anything of value, a credit card which has been revoked or canceled by the issuer thereof (as distinguished from expired), and notice of such revocation or cancellation has been given to such person, is guilty of a misdemeanor if the total amount of goods, property or services or other things of value so obtained thereafter by such person does not exceed $100; and is guilty of a felony if the total amount of goods, property or services or other things of value so obtained thereafter by such person exceeds $100.

SEC. 2. This act shall become effective upon passage and approval.